

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

KEVIN FERNANDEZ,

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

Case No. 3:06-cv-00628-LRH-RAM

**ORDER**

This is a civil rights action brought *pro se* by Kevin Fernandez. Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (#5). The Court determined that counts one, five, and six of the complaint did not state viable claims for relief, and dismissed those claims with prejudice (#72). Thereafter, the Court granted the plaintiff's motion for leave to amend the complaint (#153). The Court screened plaintiff's second amended complaint (#154), found that counts one and six of the second amended complaint did not state viable claims for relief, and dismissed those claims with prejudice (#155). On May 19, 2009, the Court granted the plaintiff's motion for leave to amend the complaint (#305) and the plaintiff submitted his third amended complaint (#306). The court now screens plaintiff's third amended civil rights complaint.

**I. Screening Standard Pursuant to 28 U.S.C. § 1915A**

The court must screen the complaint pursuant to 28 U.S.C. § 1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such

1 relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed.  
2 *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.  
3 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws  
4 of the United States was violated, and (2) that the alleged violation was committed by a person acting  
5 under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

6 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation  
7 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of  
8 poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which relief may  
9 be granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
10 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is  
11 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
12 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses  
13 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions  
14 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could  
15 not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

16 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*  
17 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim  
18 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
19 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making  
20 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the  
21 Court construes them in the light most favorable to the plaintiff. *See Warshaw v Xoma Corp.*, 74 F.3d  
22 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than  
23 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404  
24 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed  
25 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*  
26 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action  
27 is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

1 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the  
 2 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal  
 3 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of  
 4 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
 5 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28  
 6 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

## 7 **II. Screening of the Complaint**

### 8 **A. Defendants**

9 Plaintiff has once again named the State of Nevada and the Nevada Department of Corrections  
 10 ("NDOC") as defendants in this action. The court has twice previously noted that plaintiff cannot sue  
 11 the State of Nevada and NDOC. The Eleventh Amendment bars suits against states, as a state is not a  
 12 "person" subject to suit under 42 U.S.C. § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S.  
 13 43, 68-69 (1997); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Hale v. Arizona*, 993  
 14 F.2d 1387, 1398 (9th Cir. 1993) (*en banc*). Furthermore, the Eleventh Amendment bars suits against  
 15 state agencies as they are considered an "arm of the state" and not a "person" for the purpose of § 1983.  
 16 *See Hyland v. Wonder*, 117 F.3d 405, 413 (9th Cir. 1997), *amended*, 127 F.3d 1135 (9th Cir. 1997); *Doe*  
 17 *v. Lawrence Livermore Nat. Laboratory*, 131 F.3d 836 (9th Cir. 1997); *Lucas v. Dep't of Corrections*,  
 18 66 F.3d 245, 248 (9th Cir. 1995). Therefore, both the State of Nevada and the Nevada Department of  
 19 Corrections shall be dismissed from this action.

### 20 **B. Ground One**

21 Plaintiff's first cause of action claims an Ex Post Facto violation under Article One, Sections  
 22 Nine and Ten, of the United States Constitution and Article One, Section Fifteen of the Nevada  
 23 Constitution. Plaintiff states the application of NRS 213.1214 to his certification and parole eligibility  
 24 is a violation of the Ex Post Facto clause, as the statute cannot be retroactively applied to him.

25 The Court has twice previously dismissed this ground for relief with prejudice. The Ex Post  
 26 Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the  
 27 punishment for criminal acts.'" *California Dep't of Corrections v. Morales*, 514 U.S. 499, 504 (1995).

1 There is no ex post facto violation when the law merely alters the method of imposing a penalty and does  
2 not change the quantum of punishment. *Land v. Lawrence*, 815 F. Supp. 1351, 1353 (D. Nev. 1993).  
3 In the instant case, requiring plaintiff to be certified before released on parole does not constitute an  
4 additional punishment. Moreover, while the plaintiff's was sentenced to the possibility of parole, there  
5 is no constitutional right to parole. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*,  
6 442 U.S. 1, 7 (1979); Nev. Rev. Stat. § 213.10705. Accordingly, plaintiff cannot state a claim for an  
7 Ex Post Facto Clause violation and amendment would be futile. Plaintiff's first cause of action must  
8 therefore be dismissed with prejudice.

9 **C. Grounds Two, Three and Eight**

10 Plaintiff alleges in his second, third, and eighth claims substantive and procedural due process  
11 violations. Plaintiff contends that he has suffered stigmatizing consequences from being labeled as a  
12 high risk sex offender. Plaintiff states that he has a substantive and procedural due process right in not  
13 being labeled as a high risk sex offender. Plaintiff also challenges his ability to present evidence, call  
14 and question witnesses, and generally defend himself at the psychological review panel and parole  
15 hearings.

16 As the Court has previously noted, to the extent that plaintiff claims that, but for these alleged  
17 due process violations, he would be paroled, his claims are barred and his sole remedy is habeas corpus.  
18 *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young*  
19 *v. Kenny*, 907 F.2d 874 (9th Cir. 1990). However, to the extent that the plaintiff alleges that the due  
20 process violations affect his consideration for parole eligibility in accordance with the terms of his  
21 sentence, plaintiff's claims do not necessarily challenge the validity of his conviction or continuing  
22 confinement, and therefore the claims are properly brought under § 1983. Accordingly, plaintiff's claims  
23 in his second, third, and eighth causes of action may proceed as they state cognizable claims for relief.

24 **D. Ground Four**

25 In his fourth cause of action, plaintiff claims NRS 213.1214 is unconstitutional on its face and  
26 as applied because the statute does not allow prisoners to speak at the psychological review panel  
27 hearings. Plaintiff states that he has a First Amendment right to speak at the hearing, and to file  
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1 grievances challenging the panel's decision. The Court previously construed this claim as one  
2 challenging his access to the courts and to petition the government for redress.

3 "The right of meaningful access to the courts extends to established prison grievance  
4 procedures." *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), quoting *Valandingham v. Bojorquez*,  
5 866 F.2d 1135, 1138 (9th Cir. 1999); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001). A prisoner  
6 alleging a violation of his right of access to the courts must have suffered an "actual injury." *Lewis v.*  
7 *Casey*, 518 U.S. 343, 349-50 (1996). Plaintiff has alleged an actual injury, that he was denied parole  
8 due to the denial of his access to the hearing and grievance or appellate process. Accordingly, plaintiff's  
9 claim in his fourth cause of action states a viable claim for relief and may proceed.

10 **E. Ground Five**

11 In his fifth claim for relief, plaintiff alleges that prison officials improperly applied NRS  
12 213.1214 and AR 813 to him. Plaintiff argues that in applying the statute and administrative regulation,  
13 the prison officials violated Nevada state law. This Court previously determined that, to the extent  
14 plaintiff was asserting a due process violation, the claim could proceed. Accordingly, plaintiff's fifth  
15 cause of action may proceed.

16 **F. Ground Six**

17 In his sixth cause of action, plaintiff asserts a claim of negligence under state law. Specifically,  
18 plaintiff states that the psychological review panel members had a duty to follow the provisions of NRS  
19 213.1214 and NRS 241.033. Plaintiff contends that the prison officials breached their duty under the  
20 statutes by failing to provide notice and an opportunity to present evidence. Because the claim for  
21 negligence is made under state law, and the Court may exercise supplemental jurisdiction over state law  
22 claims, plaintiff's claim in his sixth cause of action may proceed.

23 **G. Ground Seven**

24 In his seventh cause of action, plaintiff alleges a claim of retaliation. He contends that at the  
25 psychological review panel hearing, he attempted to speak and present testimony but the prison officials  
26 would not let him. Plaintiff states that each time he objected at the hearing, the officials would tell him  
27 to be quiet, and became increasingly angry with him. Plaintiff contends that he then told the officials  
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1 that he would file suit against them. In retaliation for plaintiff's threat of suit, plaintiff alleges that the  
2 prison officials changed his VASOR score sheet and his review panel rating to reflect a high risk of  
3 reoffending instead of a low risk.

4 Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the  
5 government may support a § 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985); *See also*  
6 *Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). Plaintiff must allege that defendants acted  
7 to retaliate for his exercise of a protected activity, and defendants' actions did not serve a legitimate  
8 penological purpose. *See Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65  
9 F.3d 802, 807 (9th Cir. 1995). Plaintiff's claim that the prison officials changed his risk assessment and  
10 score in retaliation for plaintiff's attempts to speak at the psychological review panel hearing and for his  
11 comment that he would file a civil lawsuit states a viable claim for relief. Accordingly, plaintiff's  
12 seventh cause of action may proceed.

### 13 **III. Conclusion**

14 Plaintiff has stated cognizable due process claims in grounds two, three, five and eight. Plaintiff  
15 also stated a cognizable First Amendment/access to courts claim in ground four. Plaintiff stated a viable  
16 state law negligence claim in ground six. Finally, plaintiff stated a viable claim for retaliation in ground  
17 seven. For the reasons stated above, plaintiff failed to state a viable claim in ground one, which shall  
18 be dismissed with prejudice. Additionally, defendants State of Nevada and the Nevada Department of  
19 Corrections are dismissed.

20 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the Third Amended  
21 Complaint (#306).

22 **IT IS FURTHER ORDERED** that Defendants State of Nevada and the Nevada Department of  
23 Corrections are **DISMISSED**.

24 **IT IS FURTHER ORDERED** that the first cause of action is **DISMISSED with prejudice**.

25 **IT IS FURTHER ORDERED** that the Clerk shall **electronically serve a copy of this Order,**  
26 **along with a copy of Plaintiff's Complaint, to the Office of the Attorney General of the State of**  
27 **Nevada, c/o Pamela Sharp, Supervising Legal Secretary, 100 North Carson St., Carson City,**  
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1 **Nevada 89701-4717.** The Attorney General shall advise the court within **twenty (20) days** of the date  
2 of entry of this order whether they can accept service of process for the named defendants and the last  
3 known address under seal of the defendants for which they cannot accept service. If the Attorney  
4 General accepts service of process for any of the defendants, such defendant(s) shall file and serve an  
5 answer or other response to the complaint within **thirty (30) days** of the date of the notice of appearance  
6 of service.

7 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon defendants or, if  
8 appearance has been entered by counsel, upon the attorney(s), a copy of every pleading, motion or other  
9 document submitted for consideration by the court. Plaintiff shall include with the original paper  
10 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
11 to the defendants or counsel for the defendants. The Court may disregard any paper received by a district  
12 judge or magistrate judge which has not been filed with the Clerk, and any paper received by a district  
13 judge, magistrate judge or the Clerk which fails to include a certificate of service.

14 DATED this 20<sup>th</sup> day of July, 2009.



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18 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE